INTRODUCTION

This case concerns a frequently litigated issue of antitrust law on which the circuits are deeply divided. In holding that in no circumstances could respondents' intentionally false statements about petitioner's products constitute a "restraint of trade" actionable under § 1 of the Sherman Act, the Third Circuit aligned itself squarely with the Fifth and Seventh Circuits. Four circuits – the D.C., Second, Sixth, and Eighth – reject that position and hold that false disparagements of a competitor's product *can* support a Sherman Act claim. In its enforcement efforts, the United States government also takes the position that false statements that disparage a competitor's product can provide the requisite proof of a restraint of trade or an exclusionary conduct element of a Sherman Act claim. Because this issue is frequently recurring, is the subject of a deep and mature circuit conflict that shows no sign of abating, is important to clarify for the conduct of American business, and is cleanly raised in a case that presents an ideal vehicle for the resolution of the conflict, the petition should be granted.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 401 F.3d 123. The opinion of the district court (Pet. App. 33a-170a) granting partial summary judgment is reported at 249 F. Supp. 2d 463.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2005. The court of appeals denied a petition for rehearing on April 11, 2005. Pet. App. 171a. On June 30, 2005, Justice Souter extended the time for filing a petition for a writ of certiorari to and including August 9, 2005. *Id.* at 173a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act is set forth at Pet. App. 172a.

STATEMENT OF THE CASE

The parties in this case manufacture and sell partitions used in restrooms of schools and other buildings constructed after competitive bidding processes.[1] The specifications for bidding, typically written by architects, state what materials are permissible for building components, such as partitions. If a bid proposes to provide components that the specifications do not permit, it cannot be considered. One aspect of competition among partition suppliers is trying to induce architects and other bid specification writers to write specifications in a way that includes their products or excludes their competitors' products.[2]

Traditionally, partitions were made from phenolic and plastic laminate materials or metal. Respondent Bobrick Washroom Equipment, Inc. ("Bobrick") manufactured and sold partitions made only from these conventional materials, as other co-conspirators did. In the 1980s, petitioner Santana Products, Inc. ("Santana") introduced and sought to market partitions made from high density polyethylene ("HDPE"), an innovative material that is cheaper than and technologically superior[3] to the conventional materials. By the end of the 1980s, five companies offered HDPE partitions. By approximately 1990, HDPE partitions were gaining a substantial and increasing market share, at the expense of conventional products. *See* C.A. App. 11642, 11619-20, 11632, 11634, 11636, 11644.

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[1] *See, e.g.*, Cal. Pub. Cont. Code §§ 10300-10301 (West 2004); N.Y. Gen. Mun. Law § 103 (McKinney 1999).

[2] The district court found: "The specification process for public buildings contracts is central to competition within the toilet partition industry." Pet. App. 37a.

[3] The technological superiority of HDPE includes greater durability, ease of maintenance, ease of cleaning, and vandal resistance. *See* C.A. App. 11622, 11630, 11636. Conventional phenolic partitions cost 44% more than HDPE ones. *See id.* at 2724.

To combat that success, respondents formed a conspiracy that included manufacturers of conventional partitions and their principal supplier. The conspirators held a series of meetings in which they agreed to engage in a campaign to disseminate to bid specifiers intentionally false statements[4] that HDPE partitions were highly flammable fire hazards (*id.* at 23-27, 157-58, 167) and to propagandize bid specifiers to write their bid specifications in a way that would exclude use of HDPE partitions. Among other things, Bobrick developed a "'fire scare' marketing campaign" (Pet. App. 134a) that the district court ruled "is aptly characterized as a 'fire scare,' intended to portray . . . the alleged extreme hazard of HDPE" (*id.*). Some of the conspirators prepared a videotape falsely depicting the flammability of HDPE partitions and making it appear to be a fire hazard. They provided the videotape to sales representatives of the other conspirators, so that they could use it in their sales presentations. *See* C.A. App. 1709-10. Respondent Bobrick's sales representatives alone made hundreds of presentations to bid specifiers falsely describing HDPE partitions as a fire hazard, and respondent Bobrick distributed copies of the fire hazard videotape to architects (*see id.* at 596-97, 599-600, 1159-60, 1235, 1355-66), as well as a

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[4] The district court noted that, in an earlier decision in this case, it had found that "Santana's underlying action depends upon Bobrick's knowing and intentional acts." Pet. App. 47a. *See also id.* at 113a ("deliberately false"). Respondents successfully argued before the district court that the basis of Santana's charges was that respondents "knowingly and intentionally made false and malicious allegations and misrepresentations with regard to [Santana's] products." *Id.* at 91a (internal quotation marks and brackets omitted). The district court agreed and on that basis granted summary judgment against some claims under the statute of limitations. Accordingly, respondents are now judicially estopped from denying that petitioner's allegations rest on their knowing and intentional false statements. *See New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). In addition, petitioner opposed summary judgment by proffering evidence that respondents knew their statements were false. *See* C.A. App. 152, 156, 953, 1107, 1109-10, 1191, 1210-14, 9254-55, 9268, 9271, 9275, 9284-85.

second similar videotape that Bobrick made itself (*see id.* at 155-56). Respondents placed advertisements in trade journals, making the same false fire hazard claims. *See id.* at 160-62, 2762-63, 2767, 2774, 2815-16, 2844, 2855-66.[5] In addition, the conspirators agreed not to make and sell HDPE partitions. *See id.* at 24, 399-400, 466-81, 648-52, 9391-93, 9399, 9431-32, 9441-42. The three co-conspirators that engaged in the manufacture and sale of HDPE partitions stopped making and selling them. *See id.* at 24, 11627.

Petitioner's proffered evidence showed that, as a result of the conspirators' campaign of intentional falsehood, architects largely ceased specifying HDPE as permissible for bids. *See id.* at 203, 204-05, 9477-78. The rapid gains in market share achieved by HDPE partitions achieved at the expense of the conspirators' products abruptly stopped. *See id.* at 11675-76. The conspirators regained their market share (*see id.* at 202-05, 2667-69, 9421-22, 9476-78, 11620, 11656) and subsequently increased the prices for their products (*see id.* at 870-72, 2724, 9434-35, 9367). Three small manufacturers of HDPE partitions exited the industry. *See id.* at 24. At considerable expense, petitioner attempted to counteract the conspira-

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[5] The district court granted summary judgment in petitioner's favor as to the literal falsity of respondents' "box lunch" slide-show presentation comparing the respective flammability properties of petitioner's and respondents' products, Pet. App. 154a-155a; and advertising claiming that respondents' products had fire resistance superior to HDPE's, *id.* at 156a-157a. The district court further found: "There is sufficient evidence to create a genuine dispute as to the truth of the assertion that HDPE is highly flammable." *Id.* at 143a. The court also found disputed fact issues concerning the literal falsity of the conspirators' video demonstration of HDPE being set on fire by a cigarette lighter, *id.* at 150a-151a; a Bobrick videotape demonstration of a partition being set on fire by placing a lighter fluid-soaked paper roll below it and igniting the roll, *id.* at 153a-154a; advertising describing HDPE as a "fire and smoke hazard," *id.* at 158a; and a script for use by respondent Bobrick's salesmen describing HDPE as highly flammable, *id.* at 158a-159a.

tors' fire hazard campaign, but its efforts met only limited success.[6]

In 1994, petitioner sued a number of the conspirators.[7] As a result, the fire hazard campaign slowed and eventually stopped.[8] Several of the conspirators began advertising, making, and selling HDPE partitions. *See id.* at 111, 210-11, 235, 239. HDPE partitions then resumed their upward growth trend in market share at the expense of conventional partitions. *See id.* at 11675-76. The parties settled that suit in 1995. *See* Pet. App. 6a.

In 1996, petitioner sued respondents in the Middle District of Pennsylvania, alleging, among other things, a conspiracy in unreasonable restraint of trade, in violation of Sherman Act § 1, 15 U.S.C. § 1.[9] After discovery, the district court granted respondents' motion for summary

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[6] Petitioner proffered evidence that the architects and specifiers to whom the false statements were made were not knowledgeable about fire safety issues (*see* C.A. App. 2044-45, 2796, 8617-18, 8621-22), that it was difficult to obtain an opportunity to present petitioner's counterarguments to them, and that it cost petitioner millions of dollars in an only partly successful advertising campaign to counteract the false statements (*see id.* at 710-12, 717). The district court found a triable issue as to whether petitioner "incurred 'loss control' costs as a result of" respondents' conduct. Pet. App. 161a. Despite the summary judgment posture of the case, however, the district court then went on to make the following "findings": "Santana has failed to show that the challenged advertisements and other dissemination of information were made to unsophisticated buyers. On the contrary, the architects and specifiers were knowledgeable purchasers who were skeptical of the 'fire scare' marketing. Furthermore, the 'fire scare' marketing was 'readily susceptible to neutralization.'" *Id.* at 120a n.47 (citing respondents' proffer of evidence).

[7] *Santana Prods., Inc. v. Toilet Partition Mfrs. Council, et al.*, Civ. A. No. 3:94-CV-1962 (M.D. Pa.).

[8] The fire hazard campaign included the period 1990 to 1994 and beyond. *See* Pet. App. 6a, 46a-47a.

[9] Respondents had not been made defendants in the 1994 suit because at that time petitioner was unaware of and lacked evidence of respondents' substantial involvement in the conspiracy.

judgment and dismissed the § 1 claim. The district court concluded, among other things, that the conduct of respondents, while concerted,[10] was not an antitrust restraint of trade.[11]

On appeal, the Third Circuit affirmed the grant of summary judgment solely on the ground that the concerted action of which petitioner complained was not a "restraint of trade." The court held that petitioner did not allege "coercive measures," Pet. App. 14a, and without coercion there cannot be a restraint of trade. There was no "enforcement device that operated to restrain trade." *Id.* at 16a.

The court termed the allegations of intentional false statements disparaging HDPE "irrelevant because 'deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned'" and "'antitrust law does not compel your competitor to praise your product.'" *Id.* at 14a (citation omitted). Moreover, the Third Circuit opined, the campaign of intentional falsehood was "classic competition on the merits of a product." *Id.* Any exclusion of petitioner or its product from the market was thus merely the result of respondent Bobrick's "superior product or business acumen." *Id.* at 15a (internal quotation marks omitted). Because the Third Circuit concluded that respondents' intentional false statements did not constitute a restraint of trade as a matter of law, the court of

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[10] The district court held that the concerted action requirements for a § 1 conspiracy were met: "Santana has proffered a plausible conspiracy theory: Bobrick and other non-HDPE toilet compartment manufacturers would have had a joint interest in excluding from the market HDPE partitions, thereby constraining supply and increasing prices. Santana has adduced evidence consistent with Bobrick's involvement in the conspiracy in the form of its communications with Formica and Metpar. The evidence is sufficiently unambiguous that it 'tends to exclude the possibility of independent action.'" Pet. App. 102a.

[11] The court of appeals stated: "The District Court held that Santana proved the concerted action element as to Bobrick, and Bobrick does not challenge this finding." Pet. App. 12a n.14.

appeals did not address the competitive impact of the challenged concerted action.

REASONS FOR GRANTING THE PETITION

A deep and mature circuit conflict exists between the D.C., Second, Sixth, and Eighth Circuits, which hold that false disparagements of a competitor's products can be charged as elements of a violation of the Sherman Act, and the Third, Fifth, and Seventh Circuits, which hold that as a matter of law such false statements cannot be deemed a restraint of trade. The Ninth Circuit has also rejected a false disparagement claim on the facts presented but suggested in dicta that it might entertain such a claim under the right circumstances.

Resolving that conflict of circuits is critical to the integrity of commerce, because the competitive process rests on businesses' ability to know the rules, and few rules are more fundamental to the competitive process than whether one competitor can stymie competition by lying about a competitor's product. In enforcing the Sherman Act, the United States has taken the position advocated by petitioner here in numerous cases over the past four decades, including in the landmark case of *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc). A failure by this Court to resolve the conflict thus creates great uncertainty both to the private sector and to the government's law enforcement efforts.

This case presents an ideal vehicle for resolving the circuit conflict, because the falsity of the statements was undeniable, and the court of appeals held that, as a matter of law, such statements could not provide the restraint of trade element of a Sherman Act claim.

I. A DEEP CIRCUIT CONFLICT EXISTS ON WHETHER INTENTIONALLY FALSE STATEMENTS ABOUT A COMPETITOR'S PRODUCT CAN SUPPORT A SHERMAN ACT CLAIM

The Third Circuit held that concerted action to exclude a competitive product from the market by disseminating

intentionally false statements *cannot* violate Sherman Act § 1 as a matter of law. That holding is in stark conflict with decisions of the Second, Sixth, Eighth, and District of Columbia Circuits. The Third Circuit drew support for its decision from the Fifth and Seventh Circuits.

A. Four Circuits Hold That False Product Disparagement Can Support A Sherman Act Claim

1. Eighth Circuit – *Travel Arrangers*

In *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255 (8th Cir. 1980), the Eighth Circuit has squarely held that false disparagement of a competitor's product supports a Sherman Act § 1 or § 2 claim. In that case, the defendants engaged in a campaign of advertisements and other communications falsely and misleadingly disparaging group charter tours, a new form of travel service beginning to make inroads on Western's conventional air travel service. The Eighth Circuit held that a conspiracy among the defendants to use false statements to eliminate a new type of travel service violated both § 1 and § 2 of the Sherman Act when it resulted in substantial anticompetitive market effects.

The court based its conclusion that the defendants' conduct was illegal in part on the falsity of the statements made. Unlike the Third Circuit below, which held that respondents' false statements about petitioner's products were "irrelevant," the Eighth Circuit in *Travel Arrangers* held that "the ad is false, deceptive and misleading" and, as such, "*must* be considered in determining whether or not an unreasonable restraint of trade occurred." *Id.* at 1264 (emphasis added). The Eighth Circuit characterized the defendants' use of false and misleading advertising as exclusionary and *not* competition on the merits:

> Western did not choose to compete with ITA's [travel group charters ("TGCs")], but rather chose to prevent TGCs from becoming competition in the market

> place. Under the rule of reason, Western's anti-TGC campaign is an unreasonable restraint of trade.

Id. at 1268. The conduct that the Eighth Circuit condemned in *Travel Arrangers* as an unreasonable restraint of trade is almost identical to the conduct that the Third Circuit below immunized as *not* amounting to a restraint of trade. Had this case arisen in the Eighth Circuit, therefore, petitioner would have been entitled to a trial on the merits, and the case would not have been summarily dismissed on the ground that respondents' intentionally false statements were irrelevant under Sherman Act § 1.

2. D.C. Circuit – *Microsoft*

In *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001) (en banc), the court upheld a judgment of monopolization against Microsoft. The condemned exclusionary conduct included intentionally deceiving software developers into believing that Microsoft's version of Java was compatible with other versions, which functioned with both Windows and other operating systems. In fact, Microsoft had written its version of Java so that applications written with Microsoft Java were incompatible with other Javas and with any operating system except Windows. Microsoft sought, the court found, to perpetuate its Windows monopoly in the operating system market by causing Java applications to be unusable with any other operating system. Microsoft's deception was intentional and had the purpose of eliminating a threat to Microsoft's monopoly power in the market for operating systems. *Id.* at 76. There was no procompetitive justification for Microsoft's campaign of deception. The D.C. Circuit therefore held that Microsoft's deceptive conduct was "exclusionary, in violation of § 2 of the Sherman Act." *Id.* at 77.[12] That holding is directly contrary to the decision below, which upheld summary judgment against petitioner.

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[12] To the same effect is the D.C. Circuit's earlier decision in *Caribbean Broadcasting System, Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998). In that case, the court held that a proper claim

The D.C. Circuit's holding that intentional false statements can support Sherman Act claims arose in the context of a § 2 claim for illegal maintenance of a monopoly. *Id.* This Court – as well as many courts of appeals – have held that § 1's prohibition on restraints of trade is a subset of § 2's prohibition on monopolization.[13] As this Court explained in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), "the two sections overlap in the sense that a monopoly under § 2 is a species of restraint of trade under § 1." *Id.* at 224 n.59. *See also Microsoft*, 253 F.3d at 70 ("[t]he basic . . . concerns relevant to §§ 1 and 2 are admittedly the same"); Richard A. Posner, *Antitrust Law* 195 (2d ed. 2001) (recognizing that "falsely disparaging the competitor's products" is an exclusionary practice that does not require monopoly power to succeed, placing it in the same analytic category as blowing up a competitor's plant). Thus, cases holding practices as illegal restraints of trade to support monopolization apply *a fortiori* to conspiracies under § 1, because courts have recognized that the violations prohibited under § 2 require proof of a greater degree of anticompetitive effect than does § 1.

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for relief under Sherman Act § 2 was stated where the allegations included a charge that the defendants "made fraudulent misrepresentations to advertisers" and thus "intentionally and successfully, by means of fraud and deceit, secured monopoly power in the relevant market." *Id.* at 1087.

[13] *E.g., Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992) ("Monopoly power under § 2 requires . . . something greater than market power under § 1."); *United States v. Griffith*, 334 U.S. 100, 106 (1948) ("[T]hose things which are condemned by § 2 are in large measure merely the end products of conduct which violates § 1."); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 239 (1st Cir. 1983) (Breyer, J.) ("[i]f Pacific's challenged conduct is not 'exclusionary,' for purposes of Sherman Act § 2, then *a fortiori*, it does not violate" § 1); *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1193 n.16 (8th Cir. 1982) ("[A]n unlawful conspiracy under Section 2 necessarily violates Section 1 as an 'unreasonable' restraint of trade.").

3. Second Circuit – *Ayerst*

In *National Association of Pharmaceutical Manufacturers, Inc. v. Ayerst Laboratories*, 850 F.2d 904 (2d Cir. 1988), the Second Circuit considered a case similar to petitioner's case in all relevant respects. The defendants there had sent a letter to pharmacists across the country that the Food and Drug Administration concluded was "false and misleading." *Id.* at 916. The district court dismissed on the pleadings the plaintiff's claim for a Sherman Act violation. The Second Circuit reversed, holding that the plaintiff "should be allowed to go forward with the discovery process to substantiate its claim that the [l]etter was clearly false, clearly material, and clearly likely to induce reasonable reliance." *Id.* The court held that a claim under § 2 of the Sherman Act could be based entirely on the defendant's dissemination to retailers of a false and deceptive letter about the plaintiff's product, provided that the plaintiff could show substantial, rather than merely *de minimis*, anticompetitive effect. The Second Circuit recognized that there is "no redeeming virtue" in deception, but because litigation involves administrative costs it insisted on a showing of substantial anticompetitive effect and other factors warranting judicial intervention under § 2 of the Sherman Act. *Id.* (internal quotation marks omitted).

4. Sixth Circuit – *Conwood*

The Sixth Circuit similarly upholds the position that false and misleading representations about a competitor's product can support a Sherman Act claim. In *Conwood Co. v. United States Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002), the court upheld a jury verdict finding a § 2 violation where the defendant "misused its position as category manager by providing *misleading information* to retailers in an effort to dupe retailers into believing, among other things, that USTC products were better selling so that retailers would carry USTC products and discontinue carrying Conwood products." *Id.* at 783 (emphasis added). The evidence also showed that the defendant "used its

monopoly power to misrepresent sales activity of moist snuff products" and by doing so "to bury competitors' products." *Id.* at 787 n.4. The Sixth Circuit decisively rejected the argument accepted here by the Third Circuit, that such business tactics did not "amount to antitrust violations." *Id.* at 783.

Contrary to the Third Circuit's holding below, therefore, four circuits thus squarely hold that intentionally false and misleading disparagement of a competitive product can support a Sherman Act claim.

B. Two Circuits Join The Third Circuit To Hold That False Product Disparagement Cannot Support A Sherman Act Claim

In rejecting the position adopted by the majority of the circuits, the Third Circuit aligned itself with the Fifth and Seventh Circuits. The court below read those circuits as hewing to a rule that statements about a competitor's product – even if "false or misleading or incomplete or just plain mistaken" (Pet. App. 16a (citation omitted)) – do not give rise to an antitrust violation. Although the court below may have somewhat overstated the support for its rule from the Fifth Circuit, a recent decision of the Seventh Circuit confirms that a minority of circuits hold that false disparagements of a competitor's product are per se not actionable under the Sherman Act.

1. Fifth Circuit – *Stearns*

In holding that making intentionally false statements to exclude competition cannot be the basis of a § 1 claim, the Third Circuit relied on *Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518 (5th Cir. 1999). *See* Pet. App. 14a. In *Stearns*, the plaintiff based its § 2 claim in part on the defendant FMC's efforts to exclude it from the market by persuading municipalities to write bid specifications requiring FMC's type of bridges, rather than the plaintiff's, because of the alleged technological superiority of FMC's kind of bridge. The plaintiff introduced evidence that FMC's statements about "its products are mislead-

ing." 170 F.3d at 527. The Fifth Circuit, however, rejected that evidence as proof of "exclusionary conduct" to support an antitrust claim. *Id.* "All of these arguments made by FMC to its potential customers may have been wrong, misleading, or debatable," the Fifth Circuit said, but "they are all arguments on the merits." *Id.* at 524. It then added, "[t]o the extent a competitor loses out in such a debate, the natural remedy would seem to be an increase in the losing party's sales efforts on future potential bids, not an antitrust suit." *Id.* at 525. Although the Fifth Circuit did not go as far as the Third Circuit in viewing as "irrelevant" for antitrust purposes a competitor's campaign of intentional falsehoods, the Fifth Circuit's approach in *Stearns* is certainly consistent with the approach of the court below, and in conflict with that of the D.C., Second, Sixth, and Eighth Circuits.

2. Seventh Circuit – *Schachar* and *Sanderson*

The Third Circuit also relied (Pet. App. 13a) on *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989). In that case, the Seventh Circuit opined that, if "statements should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but more speech – the marketplace of ideas." *Id.* at 400. In *Schachar*, a medical association had issued a press release calling a surgical procedure "experimental." *Id.* at 398. Physicians using the procedure sued under § 1, charging a conspiracy in restraint of trade on the ground that the press release harmed their efforts to compete. The Seventh Circuit upheld the dismissal of the doctor's suit, holding that "[t]here can be no restraint of trade without a restraint." *Id.* at 397. The court flatly rejected the argument that false statements about a competitor's product could ever be a restraint of trade because such tactics were part of the "[w]arfare among suppliers and their different products." *Id.* at 399. In the Seventh Circuit's view, unless some coercive enforcement effort accompanied the false

disparagements, "there is not even the beginning of an antitrust case." *Id.*

The Seventh Circuit recently reaffirmed *Schacher* and expressed agreement with the Third Circuit's decision below. *See Sanderson v. Culligan Int'l Co.*, No. 04-3253, 2005 WL 1618817 (7th Cir. July 11, 2005). In that case, the court flatly held that "[f]alse statements about a rival's goods do not curtail output in either the short or the long run." Slip op. at 4. As the Seventh Circuit concluded, in conflict with the four circuits discussed in Part I.A, "[c]ommercial speech is not actionable under the antitrust laws." *Id.* at 6 (citing Pet. App. 14a-16a).

A square 4-3 conflict thus exists on whether intentionally false disparagements of a competitor's product can support a Sherman Act claim.[14]

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[14] A Ninth Circuit decision that the district court mentioned (Pet. App. 119a n.47) is also relevant to the conflict of circuits. In *American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal & Professional Publications, Inc.*, 108 F.3d 1147 (9th Cir. 1997), the defendant circulated false advertisements to law schools disparaging the plaintiff's ability to offer bar review courses. The plaintiff asserted that this and other allegedly exclusionary conduct provided the basis for a § 2 claim of actual and attempted monopolization. On appeal from a district court judgment as a matter of law that overturned a jury verdict for the plaintiff, the Ninth Circuit affirmed. Although the court recognized that false or misleading advertising is not "competition on the merits," *id.* at 1152, and it invoked the Second Circuit's *Ayerst* approach, the Ninth Circuit did not consider that prospective students were likely to rely on the false advertising and it was unconvinced that the plaintiff could not have neutralized it, *id.* Moreover, the court held that the plaintiff's proofs at trial of market power and anticompetitive effect were insufficient to satisfy § 2. In contrast, the Third Circuit below did not reach the factual merits of petitioner's § 1 claim and upheld summary judgment on the ground that intentionally false statements could not support a § 1 claim, regardless of the facts.

C. The Third Circuit Erred In Concluding That A Conspiracy To Exclude Competition By Using Intentionally False Statements Can Never State A Claim Under Sherman Act § 1

The Third Circuit held as a matter of law that an agreement among competitors to exclude a competitive product from the marketplace through a campaign of intentional false disparagement did not involve any "restraint of trade" and therefore *could not* violate Sherman Act § 1. *See* Pet. App. 13a-14a. That position is incorrect and should be reversed by this Court.

The core of the Third Circuit's rationale for concluding that no "restraint" could be found in the conspiratorial activity alleged here was as follows:

> It is undisputed that the defendants informed potential customers that Santana's product presented safety hazards. Santana has not, however, demonstrated that Bobrick imposed any restraints on trade. Santana does not allege that Bobrick engaged in coercive measures that prevented Santana from selling its products to any willing buyer or prevented others from dealing with Santana. Moreover, Santana's allegations of fraud in the manner in which the hazards of HDPE were portrayed are irrelevant because "deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." [*Eastern R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 145 (1961)]; *cf. Schachar*, 870 F.2d at 399 ("antitrust law does not compel your competitor to praise your product or sponsor your work.").

Id. at 13a.

The Third Circuit's concept of "restraint of trade" is badly flawed on several grounds. First, the statute does not prohibit "restraints of trade" as such. It prohibits agreements and other concerted activity that are "*in* [unreasonable] restraint of trade." 15 U.S.C. § 1 (emphasis

added). The proper focus of the inquiry under § 1 is therefore on the purpose or effect of the concerted action, in relation to reducing competition in the marketplace;[15] it is not on whether the conduct that the actors jointly agreed upon is of itself properly categorized as a coercive "restraint." That cannot be the touchstone, because even conduct legitimate by itself can be a sanctionable element of an unlawful antitrust conspiracy when its purpose or effect is substantially anticompetitive.[16]

In similar, related contexts, this Court has repeatedly held that intentional deception and falsehood in the marketplace can provide the basis for an antitrust violation. For example, in *Walker Process Equipment Co. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), this Court held that excluding competition by enforcing a patent procured by fraud on the Patent Office was a violation of Sherman Act § 2. The Court reasoned that, so long as the other elements of an antitrust claim were satisfied, a plaintiff could prove the exclusionary conduct or restraint of trade element with evidence of a defendant's "fraudulent procurement of a patent." *Id.* at 176.

In *United States v. Singer Manufacturing Co.*, 374 U.S. 174 (1963), the Court based a violation of § 1 on an exclusionary conspiracy that included an agreement to prevent information necessary to the patent application process from coming to the attention of the Patent Office. *See id.* at 198 (White, J., concurring) ("Gegauf . . . feared that Singer might in self-defense draw to the attention of the Patent Office certain earlier patents the Office was unaware of"). The conspiracy was, in effect, to make false

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[15] *See National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 690 (1978); *see also id.* at 688 (the rule of reason "focuses directly on the challenged restraint's impact on competitive conditions").

[16] *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962) (collecting authorities); *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946); *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905).

representations about a product to obtain a patent. As Justice White explained in his concurrence, "such collusion to secure a monopoly grant runs afoul of the Sherman Act's prohibitions against conspiracies in restraint of trade." *Id.* at 200. *See also American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982) (standard-setting organization held liable under § 1 because it permitted manufacturer member to act as its agent to issue interpretation of organization's code that falsely communicated that competitor's product was unsafe).

The Third Circuit invoked an erroneous view of the law – that intentionally false statements about a competitor's product are "irrelevant" (Pet. App. 14a) – as a justification to ignore all facts that petitioner had proffered in opposition to summary judgment. These included that the defendants' concerted action[17] had substantial anticompetitive effects, including greatly lessening sales of the competitive product in the marketplace.[18] The Third Circuit also ignored such proffered facts as: the statements were intentionally false,[19] likely to induce customers not to deal with petitioner,[20] persisted for an extended

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[17] "The District Court held that Santana proved the concerted action element as to Bobrick, and Bobrick does not challenge this finding." Pet. App. 12a n.14.

[18] *Supra* p. 4.

[19] The district court held that, for summary judgment purposes, "there were fact issues as to the literal falsity of statements made in videos, advertisements, and other marketing material." Pet. App. 8a.

[20] The district court held that "flame and smoke resistance characteristics are clearly pertinent" to attempts of producers "to convince architects and building specifiers to utilize their particular products." Pet. App. 110a. *See also id.* at 1a-2a ("In order to persuade government architects to specify Bobrick's toilet partitions for use in government projects, [respondents] were telling architects that the partitions of [petitioner] posed a fire hazard under fire safety codes."). In this case, the fire hazard charges were not only likely to induce customers not to deal with petitioner, but in fact caused a drastic diversion of sales from it. *Supra* p. 4.

period,[21] and could not effectively be neutralized.[22] A proper disposition of this case on remand, therefore, would consider that evidence.

The Third Circuit stressed that respondent Bobrick did not *coerce* petitioner in a way that constrained willing buyers from dealing with it. While such coercion can violate § 1,[23] coercion is not a necessary ingredient of an antitrust violation. For example, in an exclusive dealing arrangement between a willing buyer and willing seller that forecloses other parties from dealing with the buyer or seller, no coercion of either contracting party, or "constraint" of the public, is an element of the violation. The determinative factor is whether competition in the marketplace is likely to be substantially lessened as a result of the arrangement.[24] Similarly, in this Court's decisions finding antitrust liability for abuse of the standard-setting process,[25] none of the conspirators bound themselves or were coerced into making and selling only products complying with the standard. Rather, the basis of antitrust

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[21] The fire hazard campaign included the period 1990 to 1994 and beyond. *See* Pet. App. 6a, 46a-47a.

[22] *See supra* note 6.

[23] *See, e.g., United States v. Dunham Concrete Prods., Inc.*, 501 F.2d 80, 81 n.1 (5th Cir. 1974) (Sherman Act conviction based on coercive use of violence against competitors); *United States Steel Corp. v. Fraternal Ass'n of Steelhaulers*, 431 F.2d 1046, 1047 (3d Cir. 1970) (antitrust violations based on interference with commerce by coercive use of "shootings, arson, rock throwing, tire slashing, and other assorted acts of wanton vandalism"); *United States v. Bitz*, 282 F.2d 465, 467 (2d Cir. 1960) (sustaining Sherman Act indictment for agreement to restrain trade "by coercing and compelling said members to pay to the conspirators various sums of money" to avoid strikes).

[24] *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 329 (1961); *see Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 45-46 (1984) (O'Connor, J., concurring in the judgment).

[25] *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988); *American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

liability was that the concerted action had the effects of hindering competitors of the conspirators from selling their products and of depriving the public of the benefit of such competition. That is exactly the harm of respondents' concerted action in this case – not coercion, but just exclusion from the market, thereby lessening competition and depriving the public of the benefit of a cheaper, innovative product (HDPE partitions).

The Third Circuit's invocation of *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), is also wide of the mark. *Noerr* immunized only deception in the context of petitioning the government, a protected right under the First Amendment. Neither the First Amendment nor any ramification of the *Noerr* doctrine immunizes non-petitioning, intentionally false speech in the marketplace. Thus, this Court's test for regulation of commercial speech, set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980), makes its first step an inquiry into whether the speech is "false or misleading." If it is, the inquiry ends and the speech receives no First Amendment protection. *Id.* at 566.[26] In any event, the most latitude to which such speech could be entitled would be to require that the conspirators have acted with actual malice or reckless disregard for the truth. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964).[27] In

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[26] *Accord Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 367 (2002). *See also Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake."); *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25, 32 (1st Cir. 1970) ("[T]he efforts of an industry leader to impose his product specifications by guile, falsity, and threats on a harried architect hired by a local school board hardly rise to the dignity of an effort to influence the passage or enforcement of laws.").

[27] *See also* Arlen W. Langvardt, *Free Speech Versus Economic Harm: Accommodating Defamation, Commercial Speech, and Unfair Competition Considerations in the Law of Injurious Falsehood*, 62 Temple L.Q. 903. 974 (1989) (advocating negligence standard for commercial

the present case, the actual-malice standard is met because respondents' statements about HDPE were intentionally false. The First Amendment therefore does not shield respondents' conspiracy.

Finally, the Third Circuit's view of respondents' campaign of intentional falsehood as "classic competition on the merits of a product," "'simple salesmanship' that enhanced rather than subverted competition on the merits," and "business acumen" (Pet. App. 14a-15a (internal quotation marks omitted)) grossly mischaracterizes the conduct. Spreading lies in the marketplace is no more "competition on the merits" than shouting "Fire!" in a theater is protected speech.[28] By the same token, the court's assurances that respondents were not preventing petitioner from "pushing its arguments," and therefore it was sufficient that petitioner's remedy against respondents' false and misleading statements should only be "more speech – the marketplace of ideas," are at odds with the economic realities of this marketplace. Petitioner's proffered evidence showed that the cost to it of trying to neutralize respondents' campaign of intentional falsehood greatly exceeded the cost to respondents of spreading the falsehoods,[29] making "more speech – the marketplace of ideas" an economically infeasible or ineffective counter-tactic.

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defamation on matters of public concern, because commercial speech is entitled to less First Amendment protection than noncommercial speech).

[28] *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-86 (1992) (holding that some verbal expressions are "of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality"; the law therefore treats them as "a 'nonspeech' element of communication" and thus outside the protection of the First Amendment) (internal quotation marks omitted); *Schenck v. United States*, 249 U.S. 47, 52 (1919).

[29] Petitioner expended millions of dollars in an only partly successful advertising campaign to counteract the false statements. *See* C.A. App. 710-12, 717. The district court found that "Santana has proffered evidence that Bobrick characterized the financial resources devoted to its campaign as 'negligible.'" Pet. App. 90a-91a.

Respondents' campaign of falsehood therefore successfully imposed much greater operating costs on petitioner and lowered its demand curve – at relatively little cost to respondents. Increasing the operating costs of a competitor and lowering its demand curve are well-recognized exclusionary practices.[30]

In this conflict of circuits, the Third Circuit is clearly on the wrong side. The D.C., Second, Sixth, and Eighth Circuits are on the right side in holding that, given appropriate anticompetitive effects, an antitrust claim can be based on intentionally false product disparagement.

D. The Third Circuit's Position Conflicts With The Antitrust Enforcement Position Of The United States

For decades, the United States has taken the position that false statements about a competitor may support a Sherman Act violation. In *Walker Process Equipment*, for example, this Court characterized the United States' position as follows: "[T]he United States, which appears as *amicus curiae*, argue[s] that if Food Machinery obtained its patent by fraud and thereafter used the patent to exclude Walker from the market through 'threats of suit' and prosecution of this infringement suit, such proof

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[30] *See, e.g.*, Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich. L. Rev. 213, 274-80 (1985) (summarizing and discussing earlier scholarship on raising rivals' costs, and suggesting "that the strategy is both common and quite harmful to consumer welfare"); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power Over Price*, 96 Yale L.J. 209 (1986) (arguing that many firms employ strategic behavior to raise competitors' costs); Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 Am. Econ. Rev. 267 (1983). In the *Conwood* case, *supra*, the Sixth Circuit observed that the destruction of Conwood's display racks by UST imposed costs on Conwood in excess of $100,000 per month plus substantial policing and administrative time, *see* 290 F.3d at 778, but at little cost to UST. *See also* Harry S. Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 Syracuse L. Rev. 1029, 1062-66 (1991) (explaining why counter-measures cost more than cost of producing and disseminating false information).

would establish a prima facie violation of § 2 of the Sherman Act." 382 U.S. at 175. *See also* Brief for the United States as Amicus Curiae at 14, *Walker Process Equip. Co. v. Food Mach. & Chem. Corp.*, No. 13 (U.S. filed Mar. 1965) (arguing that deliberately misleading a government office into granting patent should be held conclusive evidence of specific intent to achieve unlawful monopoly power).

More recently, the Department of Justice Antitrust Division has filed an *amicus* brief in *Massachusetts School of Law at Andover, Inc. v. American Bar Association*, 107 F.3d 1026 (3d Cir. 1997), in which it stated:

> It is beyond debate, for example, that untruthful speech enjoys no absolute constitutional protection. "Untruthful speech, commercial or otherwise, has never been protected for its own sake." An agreement among competitors to publish false information, for the purpose and with the effect of excluding rivals and thereby enhancing or maintaining market power, would thus enjoy no First Amendment immunity from the Sherman Act.

Brief for the United States as Amicus Curiae at 15-16, No. 96-1792, 1996 WL 33420204 (3d Cir. filed Oct. 28, 1996) (citations omitted). It is impossible to reconcile the government's position in that case with the Third Circuit's holding below.

Finally, the United States' position in the landmark case of *United States v. Microsoft Corp.* was that Microsoft engaged in unreasonable restraint of trade by, in part, falsely claiming that its version of Java software was fully compatible with Sun's standards, when in fact applications writers who wrote software compatible with Microsoft Java became foreclosed from using any operating system other than Windows. *See* Brief for Appellees United States and the State Plaintiffs at 64-65, Nos. 00-5212 & 00-5213, 2001 WL 34135295 (D.C. Cir. filed Jan. 12, 2001)

("U.S. *Microsoft* Br.").[31] The government argued (successfully) that such false representations and intentional disruptions of a competitor's product were restraints of trade.

The Third Circuit's erroneous position, which conflicts with the federal government's enforcement position and a majority of circuits, thus creates uncertainty not only in private antitrust actions, but also in the federal government's antitrust enforcement efforts.

E. This Case Presents An Ideal Vehicle For Deciding Whether Intentionally False Disparagement Can Support A Sherman Act Claim

This case is an appropriate vehicle for resolving the conflict among the circuits, because the court below made the issue purely one of law without questions of degree as to the facts. Assuming all facts to be most favorable to the non-moving party,[32] the Third Circuit nonetheless upheld summary judgment against petitioner because, in its view, even successful concerted action to exclude competition by a campaign of intentional falsehood could not be the basis for a claim under Sherman Act § 1. The question thus lends itself to a simple answer: either a claim under § 1 can in some circumstances be based on intentionally false product disparagement or it never can.

It is unnecessary for this Court to determine definitively what is the minimum quantum of evidence sufficient to support a § 1 antitrust claim based on intentionally false statements, or needed to withstand summary

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[31] Similarly, the Federal Trade Commission has brought suit against patent owners' use of false statements for anticompetitive purposes in standard setting. *See* Decision and Order, *Matter of Union Oil Co.*, Docket No. 9305, 2005 WL 1541537 (consent order announced June 10, 2005, pending subject to public comment); Consent Order, *Matter of Dell Computer Corp.*, 121 F.T.C. 616 (1996) (consent order).

[32] Petitioner proffered factual proof of anticompetitive intent and effect, *see, e.g., supra* pp. 4-5, comparable to the facts involved in the cases in the four circuits that recognize an antitrust claim based on false disparagement, *see supra* pp. 8-12.

judgment. To resolve this case in its present posture, it is necessary only to decide that the Third Circuit was wrong in holding that no amount or kind of evidence could ever support such a claim, because the court below held that no disputed issue of material fact existed requiring a trial on the merits of petitioner's proffered evidence. *See* Pet. App. 14a. Nonetheless, petitioner's proffered facts manifest to this Court the kind of circumstances that the Third Circuit's absolute rule against such claims would leave without redress. Those facts include proof that respondents' campaign of intentional falsehood had a purpose to exclude competition and caused substantial actual anticompetitive effects in the relevant market.[33]

Not only can such conduct substantially harm competition, as it allegedly did here, but it is without any redeeming social or economic value. Intentional falsehood in the marketplace has no procompetitive benefit to the public. It just causes a deadweight economic loss. Indeed, various federal and state laws proscribe it.[34] False disparagement is not competition on the merits, but rather conduct designed to prevent such competition.

II. THE THIRD CIRCUIT'S REFUSAL TO EVALUATE THE CONSPIRACY AS A WHOLE CONFLICTS WITH THIS COURT'S DECISIONS

Although the principal exclusionary tactic of the coconspirators was a campaign of intentional false statements, they agreed to and did utilize other tactics to exclude HDPE partitions from the market. They agreed to

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[33] The facts alleged here, *see supra* notes 4-6 and accompanying text, meet the standard of proof that the Second and Ninth Circuits demanded for a § 2 monopolization case under the *Ayerst* test. A § 1 case, however, requires lesser proof than is required for § 2. *See supra* note 13.

[34] *See, e.g.*, Federal Trade Commission Act § 5, 15 U.S.C. § 45; Lanham Act § 43(a), 15 U.S.C. § 1125(a); *see also California Dental Ass'n v. FTC*, 526 U.S. 756, 771 n.9 (1999) (false or misleading advertising has an anticompetitive effect) (citing *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 79-80 (1934)).

refrain from manufacturing HDPE partitions themselves. They also agreed to propagandize architects and other persons writing bid specifications to write specifications that required bidders to provide non-HDPE partitions.

The Third Circuit's opinion does not address whether a conspiracy having *all* of the elements alleged here can, when accompanied by anticompetitive intent and effect, violate Sherman Act § 1. Indeed, the Third Circuit completely ignored these additional elements of the conspiracy, although petitioner proffered evidence as to them and briefed them as violative of § 1 at all stages of the proceeding. Yet, settled antitrust precedent recognizes that these elements of the overall conspiracy alleged here can, if engaged in with anticompetitive intent or effect, support a § 1 violation or even be sufficient by themselves to violate § 1.

Agreeing not to make or sell a particular product, as the conspirators did here,[35] is a recognized antitrust violation.[36] Indeed, even an agreement to decrease output of a product or set an output quota for it is an antitrust violation.[37] Agreeing to propagandize architects and other bid specification writers to write bid specifications that excluded HDPE partitions may or may not be unlawful in itself, but surely a court must evaluate its competitive ef-

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[35] Several conspirators, before the formation of the conspiracy, were engaged in the manufacture and sale of HDPE partitions along with conventional partitions. Pursuant to the conspiracy, however, they stopped manufacturing and selling HDPE partitions, thereby reducing their output of the product to zero. After the conspiracy terminated, they resumed manufacture and sale of HDPE partitions.

[36] *See Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912) (agreement not to market second-grade enamel ware held violation of Sherman Act).

[37] *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (agreement to decrease gasoline production and adhere to output quotas held part of § 1 violation). *See also NCAA v. Board of Regents*, 468 U.S. 85, 109 (1984) (quota as to number of games member schools could televise held "naked restriction").

fect when it is part of an exclusionary conspiracy. *Supra* note 16 & accompanying text.

The court below therefore committed reversible error when it determined the legality of respondents' agreement to exclude HDPE partitions from the market by a campaign of falsehood, in isolation rather than as a part of a larger overall conspiracy. This Court has commanded that, in analyzing an antitrust complaint, "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore*, 370 U.S. at 699. The failure by the court below to give petitioner the benefit of the aggregate effect of its proof improperly "dismember[ed]" the conspiracy, contrary to this Court's established precedent. *Id.* (internal quotation marks omitted).

The approach taken by the court below is also in conflict with that of other circuits and the United States' enforcement position. The Second Circuit, for example, has made clear that a coordinated campaign of acts that restrain trade in the aggregate may be sufficient to impose antitrust liability. *See City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981). Similarly, the Ninth Circuit has held that "it would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect." *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992). The Third Circuit's approach also conflicts with the enforcement position of the United States, which has argued that an antitrust defendant "is mistaken if it means to suggest that a series of actions, which standing alone would not be unlawful, can never, in combination, result in a violation of the Sherman Act." U.S. *Microsoft* Br. at 82 (citing *Swift & Co. v. United States*, 196 U.S. 375, 396 (1905)).

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As to both questions presented, therefore, the Third Circuit's decision conflicts with that of other courts and the United States' enforcement position. Resolution of these questions is critical to commercial integrity, as they address core issues of antitrust law. The notion that businesses can lie about their competitors' products is anathema to competition on the merits. This Court should reject the perverse positions of the Third, Fifth, and Seventh Circuits that permit such conduct to be free of judicial scrutiny under the Sherman Act.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM E. JACKSON
B. AARON SCHULMAN
STITES & HARBISON
P.L.L.C.
1199 N. Fairfax Street
Suite 900
Alexandria, VA 22314
(703) 739-4900

DAVID C. FREDERICK
Counsel of Record
RICHARD H. STERN
KELLOGG, HUBER, HANSEN,
TODD, EVANS & FIGEL,
P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

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